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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 04.12.2007

Coram :

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN

and

THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN

Original Side Appeal No.57 of 2004

M/s.K.R.Sethi & Sons,
1-8-215/28 (12/144),
Prender Ghast Road,
Secunderabad 540 003. Appellant

v.

1. Union of India, represented by
Deputy Director of Supplies
and Transport, Head Quarters,
Tamil Nadu, Kerala, Karnataka,
and Goa Area, Chennai 9.

2. Col. V.K.Rajendran,
Arbitrator, DDEME,
HQ ATNKK & G.Area,
Chennai 9. Respondents

Original Side Appeal preferred against the judgment and decree dated 19.09.2003 made in O.P. No.440 of 2001 by a learned single Judge of this Court.

For Appellant : Mr.T.Viswanatharao

For Respondent 1: Mr.T.Chandrasekaran, ACGSC

JUDGMENT

K. RAVIRAJA PANDIAN, J.

This appeal is filed against the order dated 19.09.2003 passed by a learned single Judge of this Court in O.P. No.440 of 2001 setting aside the award and remitting the matter back to the arbitrator with a

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direction to pass award in terms of the reference made to him and also to act within the scope and purview of his jurisdiction.

2. The facts of the case goes as follows :

The appellant herein entered into a contract with the first respondent for the supply of potato, fresh onion and dried garlic to Trimulgherry, Golconda and Bangalore depots of the respondent for a period from 01.04.1998 to 31.03.1999. It is the case of the appellant that the appellant has performed the contract as agreed till 08.07.1998 in so far as Trimulgherry destination is concerned and upto 19.07.1998 to Golconda and till 06.07.1998 to Bangalore and thereafter the appellant was not able to make supply because the commodity has become scarce and not available for procurement on account of crop failure. The non supply of the goods, which are the essential diet for the troops of Indian Armed Force, caused great hardship to the first respondent. Hence, the first respondent was compelled to procure the above said goods from the open market to meet the requirement of the above said three stations for the purpose of feeding the armed force. The purchases were made by the first respondent at the risk and expenses of the appellant. Inspite of repeated warnings and instructions given by the first respondent, the appellant was not in a position to make the supply and that forced the first respondent to purchase the goods periodically from open market and this factum of purchasing from the open market by the first respondent was duly informed to the appellant. Thus, the first respondent has incurred an extra expenditure of Rs.80,62,540.77, which is required to be paid by the appellant as per the terms of contract. The contract also contained a clause that if the appellant fails to supply the goods, the respondent could purchase the same in the open market at the cost and risk of the appellant. When demanded the amount spent by the first respondent for procurement of the commodities on the failure of the appellant to supply the same, the dispute arose touching upon the agreement and the matter was referred to arbitrator. The respondent made a claim under risk purchase term a sum of Rs.39,40,549/- for Trimulgherry, Rs.18,92,877/- for Golconda and Rs.26,65,024/- for Bangalore. In addition to that, the first respondent forfeited the security deposit in respect of three contracts, i.e., Rs.75,800/- for Trimulgherry, Rs.50,000/- for Golconda, for Rs.92,000/- for Bangalore. Besides that, the first respondent forfeited the amount due to the appellant in respect of the pending bills to the tune of Rs.77,772/- for Trimulgherry, Rs.23,052/- for Golconda, and Rs.1,01,518/- for Bangalore.

3. The arbitrator, by his award dated 29.10.1999 rejected the claim made by the first respondent for the reason that the contract became frustrated and impossible of performance due to the reason beyond the control of the appellant and thus the claim made by the first respondent was not justified and directed the first respondent to refund the amounts of pending bills to the appellant. However, the Arbitrator concluded that the forfeiture of security deposit is correct, but the interest on such deposit should be refunded to the appellant.

4. The first respondent, being aggrieved by the award of the arbitrator, filed O.P. No.440 of 2001 before this Court under section 34 of the Arbitration Act, 1996. The learned single Judge, after hearing

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the parties, set aside the award, and remitted back the matter to the arbitrator with the direction to pass an award in terms of the reference made to him and also act within the scope and purview of his jurisdiction within three months from the date of receipt of a copy of that order. The said order of the learned single Judge is assailed before this Court by filing this appeal.

5. The arbitrator, on the materials placed and the evidence adduced before him, found that there was frustration of contract since there was acute shortage of the product because of crop failure in that area and that the price of the product was hiked ranging from 200 to 500%. The obligation on the part of the appellant was bulk supply of commodities in several thousands of kilograms. The arbitrator further found that there was no escalation clause in the agreement which was prejudicial to the appellant and ultimately concluded that the appellant could not be held liable for the non performance of the contract and thus he should not be subjected to the claim of the first respondent on the basis of the risk purchase clause. The learned single Judge was of the view that the Arbitrator misdirected himself by travelling beyond the reference.

6. The learned counsel for the appellant assailed the order of the learned single Judge by contending that the scope of interference by the High Court under section 34 of the Act is very limited. The learned single Judge exceeded the jurisdiction conferred on the Court under section 34 of the Act by recording a finding that the arbitrator has exceeded its jurisdiction in deciding the issue. The reasoning of the learned single Judge that the arbitrator went wrong in concluding that the contract was frustrated, when the commodities were available, though at a higher price, is beyond his jurisdiction.

7. He further contended that the order of the learned single Judge in setting aside the award and remitting the matter back to the arbitrator is totally erroneous. The learned Judge dealt with the matter as a regular appeal against the order of the lower authorities. Even assuming that certain observations made by the arbitrator while passing the award was quite unnecessary, the Court should have ignored them and upheld the material part of the award which was passed within the paramater and within the jurisdiction of the arbitrator.

8. On the contrary, it was contended on behalf of the first respondent that the issues framed by the learned single Judge are conforming to the grounds contemplated under section 34 of the Act and as such the order of the learned single Judge is well within the parameter prescribed under section 34 of the Act. The Court while exercising the power under section 34 of the Act could quite very well go into the matter as to whether the arbitrator acted within the scope of reference or exceeded his jurisdiction outside the contract or over-stepping the jurisdiction, which otherwise amounts to misconduct of the arbitrator in arbitral proceedings. In order to see whether the arbitrator has acted within the jurisdiction it was always open to the Court to have recourse to the petition, affidavit and pleadings of the parties.

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9. It was further contended by the learned counsel for the first respondent that even on facts, the learned single Judge was correct in holding that the arbitrator has erroneously come to the conclusion that the contract has frustrated, disregard of the fact that the other contractors in other areas met the obligation during the relevant period and the appellant was not entitled to invoke section 56 of the Contract Act. On that score, the respondent sought to sustain the order of the learned single Judge.

10. We heard the learned counsel on either side and perused the materials available on record.

11. The learned single Judge has given reasons as to the circumstances under which section 56 of the Contract Act could be invoked. The arbitrator had come to the conclusion that the contract became frustrated because of the non availability of the commodity. The learned single Judge, while discussing the point, has given reasons that the commodities were very much available in the market, but the price of the same had been increased in several manifold. Because of the increase of the price, the appellant might incur loss in making the supply on such commodities, but that would not justify the appellant in stopping the supply on the said ground.

12. The learned single Judge also pointed out that certain extra-ordinary observations made by the arbitrator in paragraphs 13, 16 and 17 of the award so as to come to the conclusion that the arbitrator has over-reached the jurisdiction and went beyond the terms of the contract and rather beyond the terms of the reference also. The arbitrator incorporated his reasoning as the terms of contract, which actually were not the terms of contract. Paragraphs 13, 16 and 17 of the award requires reproduction and those paragraphs run as follows :

> "13. When a contractor promises to perform, it is always expected that he will perform even in a turn of events, which both the parties would not have anticipated. Therefore, merely on account of an uncontemplated turn of events which makes the performance consequently onerous, the contractor may not be absolved of his non-performance. It becomes imperative to see whether the change in the circumstances was brought on his own volition or the change in circumstances, as they were, made it virtually impossible for him to fulfill his obligations. In this case, it is beyond doubt that the extra-ordinary circumstances of 1998 was not brought about by the contractor. It was not a matter of mere unprofitability but that of beyond reach. The turn in events had become so so pronounced and beyond his financial reach that it becomes reasonable that the respondent failed to perform. The respondent failed to perform due to the supervening circumstances making the contract impracticable. The failure was not on his own volition.
>
> 16. Whenever a contract is drawn up, it is imperative that it is fair to both the parties and that the clauses are drawn up accordingly. However, in the instant case it is apparent that the clauses, while favouring the claimant had

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scant regard for the other party and hence it could be said that it was a one-sided contract. It was due to this that the claimant did not apply his mind to a national problem, even after the appeal by the respondent but relied on the clauses of the contract and adamently continued the procurement of potatoes and onions at exorbitant prices from the open market with the full knowledge that the entire cost thereof can be claimed from the respondent. When in 1998 the Government themselves had rationed the items and were supplying the same through Public Distribution System to the public at controlled rates, it is curious that the claimant never went through this route but went to the open market.

17. The Government is in a position of authority. The contractor on his part does not negotiate but merely adheres to the conditions in this case, the standardised form. Hence, perhaps, this contract could be termed as a 'contract of adhesion'. The individual, therefore, needs to be protected against the possibility of exploitation inherent in such a contract, especially, when the circumstances go extremely unfavourable to the individual it is imperative that in the contracts by the Army, a clause in the nature of Force Majure or price revision, even if for a short duration of three months or so, should be incorporated to safeguard the interest of the contractor, atleast in times of such calamity."

As per section 28(3) of the Arbitration and Conciliation Act, 1996, the award has to be in accordance with the terms of the contract. For the construction of the contract the intention of the parties is to be gathered from the word 'used' in the agreement. If the contractual term is taken into consideration, the award of the arbitrator, on the face of it, is erroneous and is in violation of the terms of the contract and is hit by section 28(3) of the Act. The reference has been made to the arbitrator to resolve the dispute between the parties with regard to the terms of contract, but the arbitrator over-stretched his jurisdiction, as manifest from paragraphs 13, 16 and 17 of his award. The learned single Judge has come to the conclusion that the award of the arbitrator is not in accordance with law. In our view also, the award of the arbitrator is patently illegal since it was based upon materials which were not available as terms of the contract.

13. Learned counsel for the appellant placed reliance on the decision of a Division Bench of this Court in the case of Zonal General Manager, M/s. IRCON International Ltd. v. M/s. Vinay Heavy Equipments, 2007-1-LW 257 to contend that the interpretation of the contract by an arbitrator was final and the same cannot be re-agitated before the Court in a proceeding to set aside the award. In a petition filed under section 34 of the Act the Court's jurisdiction to set aside the award could be circumscribed by the provisions of the said section.

14. There cannot be any dispute to the above proposition of law. While restating the proposition already enunciated by the Supreme Court in the Division Bench has extracted the observations of the Supreme Court in ONGC V. Saw Pipes, (2003) 5 SCC 705 which is to the effect that

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the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest.

15. In Renusagar Power Co. Ltd. vs. General Electric Co., 1994 supp (1) SCC 644, the Supreme Court has set aside for being patently illegal. The apex Court observed that the award could be set aside if the award is contrary to the funamental policy of Indian law or the interest of India or justice or morality. The Supreme Court further observed that the illegality must go to the root of the matter. If the illegality is trivial in nature, it cannot be held that the award is against the public policy. The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

16. It is also settled law that the intention of the parties is to be gathered from the words used in the agreement. Giving limited jurisdiction to the court for having finality to the award and resolving the dispute by speedier method would be much more frustrated by permitting patently illegal award to operate. Patently illegal award is required to be set at naught, otherwise it would promote injustice vide Oil & Natural Gas Corpn. Ltd. v. Saw Pipes Ltd.,(2003) 5 SCC 705.

17. In an other latest decision of the Supreme Court in the case of Mcdermott International Inc. v. Burn Standard co. Ltd., (2006) 11 SCC 181, the Court held that in terms of the 1996 Act, a departure was made so far as the jurisdiction of the court to set aside an arbitral award is concerned vis-a-vis the earlier Act. Whereas under Sections 30 and 33 of the 1940 Act, the power of the court was wide, Section 34 of the 1996 Act brings about certain changes envisaged thereunder. Section 30 of the old Act did not contain the expression "error of law". The same was added by judicial interpretation. The Court further observed that 1996 Act makes provision for supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The Court further observed that the arbitral award could be set aside if it is contrary to the fundamental policy of Indian Law, or interest of India or justice or morality or if it is patently illegal. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the Court. Lastly, where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute, would come within the purview of section 34 of the Act. It also further observed that what would constitute public policy is a matter dependant upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the Court to judge what is in public good at the relevant point,

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as contradistinguished from the policy of a particular Government.

18. As already stated, the learned single Judge has pointed out that jurisdictional error is committed by the arbitrator, which cannot be regarded as reappreciation of the evidence. The observations made by the Arbitrator in paragraphs 13, 16 and 17 are definitely beyond the jurisdiction, when he was required to arbitrate the dispute in accordance with the terms of the contract. Even on the face of the award, it is obvious that the arbitrator has misdirected himself in passing the award. So, we are not able to interfere with the order of the learned single Judge.

19. However, a vital aspect of the matter in this case has to be considered is whether the learned single Judge, while exercising power under section 34 of the Act, after setting aside the award can remit the matter back to the arbitrator to pass fresh orders by giving directions. The answer to the question is very much available in the decision of the Supreme Court in the case of Mcdermott International Inc. v. Burn Standard co. Ltd., (2006) 11 SCC 181, wherein the Supreme Court has observed that the 1996 Act makes provisions for supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The Court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired.

20. For the reasons stated above and in the light of the decisions cited supra, we are of the view that the order of the learned single Judge setting aside the award, could be confirmed, but as regards the direction given by the learned single Judge remitting the matter back to the arbitrator, we are of the view that that direction cannot be sustained.

20. In the result, the order of the learned single Judge setting aside the award is confirmed, but the portion of the order of the learned single Judge remitting the matter to the arbitrator is set aside leaving the parties free if it is desired to begin the arbitration again. Thus, the appeal is disposed of. No costs.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

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To

1. The Sub Assistant Registrar,
Original Side,
High Court, Madras.

2. Col. V.K.Rajendran,
Arbitrator, DDEME,
HQ ATNKK & G.Area,
Chennai 9.

+ 1 CC To Mr. T.Viswanatha Rao, Advocate SR NO.71609

+ 1 CC To Mr. T.Chandrasekaran SCGSC, Advocate SR NO.71491

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